IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 421.

LOUISIANA PUBLIC SERVICE COMMISSION ET AL.,
APPELLANTS,

vs.

MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY.

MOTION OF CITY OF NEW ORLEANS TO FILE BRIEF AS AMICUS CURIÆ AND TO PARTICIPATE IN ORAL ARGUMENT, WITH CONSENT THERETO BY DEFENDANT IN ERROR.

IVY G. KITTREDGE,
Counsel for City of New Orleans.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

ON WRIT OF ERROR FROM THE DECISION OF THE DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION, IN THE CASE NO. 111 (IN EQUITY) OF ITS DOCKET, ENTITLED

No. 421.

MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY

versus

LOUISIANA PUBLIC SERVICE COMMISSION AND OTHERS.

MOTION OF CITY OF NEW ORLEANS TO FILE BRIEF AS AMICUS CURIÆ AND TO PARTICIPATE IN ORAL ARGUMENT, WITH CONSENT THERETO BY DEFENDANT IN ERROR.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Comes now into this honorable court the City of New Orleans, through its undersigned counsel, Ivy G. Kittredge,

City Attorney of the City of New Orleans, and respectfully represents that one of the issues in this case is whether the power to compel railroads to establish, repair, and maintain viaducts over their tracks and along the lines of streets located entirely in the City of New Orleans vests in the Louisiana Public Service Commission, one of the plaintiffs in error herein, under its authority to regulate and govern all common-carrier railroads in the State of Louisiana, or whether said power vests in the Commission Council of the City of New Orleans under its authority to regulate and govern all streets located in said City of New Orleans; that the Government of the City of New Orleans has a great interest in this issue, and that therefore counsel for petitioner as *amicus curiæ* desires to obtain the permission of this honorable court to submit a brief herein on said issue, and also to participate in the oral argument on said issue on the side of the Morgan's Louisiana & Texas Railroad & Steamship Company, defendant in error, whose consent to such participation appears from the letter of its counsel hereunto annexed and made part hereof.

Wherefore your petitioner humbly so prays.

IVY G. KITTREDGE.

City Attorney for the City of New Orleans.

Order.

Counsel for the City of New Orleans is hereby permitted to submit herein a brief on the issue referred to in the foregoing petition and to participate in the oral argument on that issue as prayed for.

Morgan's Louisiana and Texas Railroad and Steamship Co.

Louisiana Western Railroad Company.

Legal Department.

Denegre, Leovy & Chaffe, General Attorneys.

In reply please refer to No. —.

New Orleans, La., *August* 31, 1923.

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION.

No. 114. In Equity.

Morgan's Louisiana & Texas Railroad & Steamship Company, *Plaintiff*,

vs.

Louisiana Public Service Commission and Others, *Defendants*.

Hon. Ivy G. Kittredge,
City Attorney,
City of New Orleans,
New Orleans, La.

Sir:

Referring to the above-entitled case, now on appeal to the Supreme Court of the United States, in view of the interest of the City of New Orleans in the principles involved, it would seem eminently proper that it should appear before the Supreme Court as *amicus curiæ*, both by brief and argument, and we write to express this view on our part as counsel for

the Morgan's Louisiana and Texas Railroad and Steamship Company and to say that we will be pleased to yield to you a portion of the time allotted to us for argument before the Supreme Court.

Yours truly,

DENEGRE, LEOVY & CHAFFE.

VL:EC.

[Endorsed:] File No. 29,731. Supreme Court U. S., October Term, 1923. Term No. 421. Louisiana Public Service Commission *et al.*, appellants, *vs.* Morgan's Louisiana & Texas Railroad & Steamship Co. Motion of City of New Orleans to file brief as *amicus curiæ* and to participate in oral argument, with consent thereto by defendant in error. Filed September 8, 1923.

IN THE

United States Supreme Court

OCTOBER TERM, 1923.

NO. 421

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

versus

MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY,
Appellee.

BRIEF OF THE CITY OF NEW ORLEANS,
Amicus Curiae.

IVY G. KITTREDGE,
City Attorney for the City of New Orleans.

Feb. 14, 1924.

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CASES CITED

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Appellee.

BRIEF OF THE CITY OF NEW ORLEANS,
Amicus Curiae.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

For the purpose of this brief, the following concise statement of the case will suffice:

In 1905 the Morgan's Louisiana and Texas Railroad and Steamship Company granted to the City of New Or-

leans, upon certain conditions, the right to construct and maintain permanently along the lines of the extension of Newton Street a viaduct across said company's property in the Fifth District of the City of New Orleans, popularly known as Algiers (Tr. 15). Thereafter the viaduct was constructed, being completed about the year 1907 and being used ever since as a way for pedestrian, vehicular and other traffic across said railroad company's land. Latterly, the viaduct needed repairs and steps were taken to cause the repairs to be made by said railroad company and by a street railroad company which had also been granted a right to use the viaduct for its tracks.

Pending these negotiations, the Louisiana Public Service Commission, upon a petition of citizens of Algiers, issued orders of date November 11th and December 1st, 1922, requiring the said Morgan's Railroad Company to provide a safe and suitable traffic viaduct over and across its tracks at Newton Street in the City of New Orleans, said viaduct to commence at a sufficient distance from the properties of said company to provide suitable and proper grades for traffic thereover (Tr. 149). Subsequently, the Public Service Commission modified these orders, and in lieu thereof required said railroad company to repair and put in safe and suitable condition for vehicular and other traffic the existing viaduct across this property, within the limits of said property, and connecting the two ends of Newton Street, and thereafter to maintain the same in a safe and suitable condition (Tr. 171). This modification of the previous orders was intended to avoid a conflict of jurisdiction between the Public Service Commission and the City of New Orleans, but, as will be seen in the argument, it does not really have that effect.

The railroad company obtained an injunction against the enforcement of the orders of the Public Service Commission (Tr. 179), and the Public Service Commission took an appeal to this court (Tr. 180).

ARGUMENT.

The City of New Orleans, which is jealous of its governmental powers over the streets and highways within its limits, has but one point to make in this case, to-wit: that the jurisdiction of the Louisiana Public Service Commission does not include power to compel the Morgan's Railroad Company to mantain and repair said Newton Street viaduct, nor the power to compel any railroad company to construct, maintain or repair any viaduct for the purpose of carrying across its tracks or property any street in the City of New Orleans.

The City of New Orleans claims that jurisdiction in this regard is lodged in its Commission Council or governing body.

To this extent only does it join the defendant and oppose the plaintiff in this case. The City takes as its premises that, under the police power of the State of Louisiana, the railroad company may be compelled to construct, maintain or repair the viaduct here in question; and contends that inasmuch as said viaduct was constructed without any reference to its relation to the services to be rendered by the railroad company (and inasmuch it has no relation to such service), but was constructed for and relates solely to the convenience and safety of the people of New Orleans, or the public generally, jurisdiction with respect to said viaduct lodges not in the Public Service Commission, but

in the City of New Orleans under ample police powers granted to it by the Legislature.

The viaduct in question continues and carries Newton Street over the tracks of the railroad company. It was constructed for the purpose of furnishing an avenue for traffic across a long unbroken strip of ground used by the railroad company as a right of way and as a site for its shop yards, railroad yards and terminals. Before the viaduct was constructed there was no crossing at this place.

Newton Street ended on one side of the strip of ground and began again on the other side. In time, as the City grew, Newton Street built up beyond the railroad's property, and it became necessary to open said street through said railroad's property, or build over or under said property. The viaduct was constructed to answer this public need and was designed and intended solely for the comfort and convenience of the public desiring to travel from one side of the railroad company's land to the other. The viaduct was constructed under contract for the City of New Orleans, and had no relation to the transportation of persons or property by the railroad company, nor was it intended, nor does it, facilitate the public in transacting business with the railroad company. In short, it has no relation whatsoever, either by intent or by actual use, to the service and functions rendered and performed by the railroad company.

The city had under consideration the renewal or repair of the viaduct or the opening by grade crossing of Newton Street, when suddenly the Public Service Commission virtually tried to take the matter out of the City's hands and ordered the repair of the viaduct by appellee. Hence this case comes up on a question of jurisdiction as

between the Public Service Commission, and the City through its Commission Council. This City in all its charters, for many years past, i. e., that of 1870, that of 1882, that of 1896, and the present charter, Act 159 of 1912, has been given full police powers over its streets and the use thereof. The Council of the City is given power and it is made their duty (Section 6) to open and keep open and free from obstruction all streets, and to keep the streets and crossings and bridges in repair. By Section 8, the Council is empowered to order the opening, widening and paving of public streets, to regulate the grade thereof and to sell or change the destination thereof, and to authorize the use of streets by railroads. By Sections 28 and 29, the Council is authorized to grant privileges and franchises for the use of public streets in connection with private businesses. In a word, the Commission Council is expressly given very broad specific powers over its streets.

Such power is always essential to city government, and the Louisiana Supreme Court has at all times liberally construed such power in favor of this City. But the present charter has gone further and in emphatic terms guaranteed full and plenary police power to this City in the broad and comprehensive language used in Section 1, paragraph (e) of the charter, to-wit:

> "The City shall also have all powers, privileges and functions which, by or pursuant to the Constitution of this State, have been, or could be, granted to or exercised by any city."

The sole and only question to be answered under Section 1 (e) is, "Could the Legislature in 1912 have granted to the City the power to control and say whether a viaduct

should be placed over a railroad crossing in this City, or whether a tunnel should be dug under the street, or whether a grade crossing should be made, or whether the public welfare demanded the sale or exchange and hence the closing of that street? Once the safest passage for the city public, not the railroad patrons, be decided upon, then the City alone is arbiter as to who should construct the crossing. In this case, this City decided some years ago, with the full acquiescence of this Public Service Commission (then under the name of Railroad Commission), that the expense of a viaduct be provided by this railroad, the street railway, and the City. Hence the appellant is now estopped from claiming jurisdiction to interfere with the control of city streets and the safety of the people using the same. *Non constat* that the city might decide to abandon and close, exchange, or sell either the portion of Newton Street below or above these railroad tracks. Could appellant in the face of such action still enforce its order and compel the repair of this viaduct by this railroad or any other? On the other hand, the City, who considered a grade crossing, might decide on such a crossing. In that event, must there be two crossings, one on the ground and one in the air? The same would apply if the City decided upon a tunnel. In 1912, the City had such control as here involved by special legislative delegation; but in the event only that this Honorable Court should reverse the lower Court, and decide that the City did not have this control by special statute, then we assert that nothing in the Constitution of 1898 forbade the legislature to delegate such power, and hence this Honorable Court will follow the decisions repeatedly rendered by the Louisiana Supreme Court, in construing Section 1 (e) of our charter, and hold that said section and paragraph

granted such power to the City as though specially delegated by the legislature.

The last and most important, and most far reaching interpretation of Section 1 (e) of our charter by our Supreme Court involved a question closely allied to the one at bar. That decision (*State vs. City*, 151 La. 23), should greatly assist, if not guide, this Honorable Court in determining the issue now before it. Our Constitution of 1921, somewhat enlarged the powers of appellant, in the following sections of Article VI:

> "Section 4. The Commission shall have and exercise all necessary power and authority to supervise, govern, regulate and control all common carrier railroads, street railroads, interurban railroads, steamboats and other water craft, sleeping car, express, telephone, telegraph, gas, electric light, heat and power, water works, common carrier pipe lines, canals, (except irrigation canals), and other public utilities in the State of Louisiana, and to fix reasonable and just single and joint line rates, fares, tolls or charges for the commodities furnished, or services rendered by such common carriers or public utilities, except as herein otherwise provided.*****"
>
> "*The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by the common carriers and public utilities* hereby, or which may hereafter be made subject to supervision, regulation and control by the Commission."
>
> "Section 9. Until otherwise provided by the Legislature, all laws enacted by the General Assembly of the State of Louisiana since the adoption of the Constitution of 1898, and in effect at the time of the adoption of this Constitution, affecting, con-

cerning, or relating to the Railroad Commission of Louisiana, not inconsistent with any of the provisions hereof, shall be construed as referring and applying to the Louisiana Public Service Commission, and nothing in this Constitution shall be construed as in any manner impairing or affecting such laws."

Thus adding to the jurisdiction of the Public Service Commission, street railroads, electric light, heat and power plants, etc., etc. But the same constitution provides as follows, in Section 7 of the same Article VI:

Section 7 of said Article further provides:

> "Nothing in this article shall affect the powers of supervision, regulation and control over any street railway, gas, electric light, heat, power, water works, or other local public utility, now vested in any town, city, or parish government unless and until at an election to be held pursuant to laws to be hereafter passed by the Legislature, a majority of the qualified electors of such town, city or parish, voting thereon, shall vote to surrender such powers. In the event of such surrender such powers shall immediately vest in the Louisiana Public Service Commission, provided, that where any town, city, or parish shall have surrendered as above provided, any of its utilities, it may in the same manner, by a like vote, re-invest itself with such powers."

Under the above sections of Article VI, the Attorney General on behalf of appellant, filed suit against the City to have the Public Service Commission recognized as being the rate-making body with jurisdiction over the street railways, electric light and gas plants and all other local public utilities in New Orleans, contending with some force that the power of rate-making must be specially delegated and

that our charter did not delegate such power to the city; that said Section 7 of Article VI could not be invoked by this city because of the absence of any such specially conferred rate-making power prior to the adoption of the said constitution. Our full Court of nine Justices in an able decision (*State vs. City*, 151 La. 23), held that under Section 1 (e) of the charter, the City had the right to fix rates, and hence that the City, and not the Public Service Commission, is the rate-making body for all local public utilities.

Until this suit, the long and often settled jurisprudence that the City has absolute and exclusive control over its streets and the use thereof by local or any other utilities, has never been questioned.

In other words, the Attorney General admitted that under all charters of this City, prior to the present charter of 1912, the power had been clearly and specifically delegated to the city to supervise, regulate and control all public utilities, and that it also had full supervision and control over the streets and other public places of the city; his contention, however, was that the City had never had the rate-making power specifically delegated to it, and that therefore, Section 7 of Article VI of the Constitution, in stipulating that "the powers of supervision, regulation and control over any ***** local public utility, now vested in any city or town" shall remain therein unless the electors of such city vote to surrender such powers, not only did not reserve to any city in the state rate-making power (even if it had formerly possessed such power), but that this City had never at any time been given such power. We submit that the case has a direct bearing, because the whole subject was there threshed out and by holding that the city, under Section 1, Paragraph (e), of its charter already had rate-

making power over public utilities using its streets, etc., the court never contemplated the absurdity, while interpreting the extreme power of rate-making in favor of the City, of simultaneously denying it, and for the first time depriving it of the absolute and exclusive control over the streets and public places used by such utilities. In the light of appellants' contention before this court, the said Supreme Court's decision above referred to would have been *"brutum fulmen"*.

This Honorable Court, we are fully satisfied, would not lend itself to a decision on a side issue such as the question now before it, of a viaduct, which would in reality strike with nullity the decision of our State Supreme Court in the above very important decision rendered in 1922, which is of such crucial importance to the present and future of the City of New Orleans. If the Public Service Commission has supervision and regulation and control of our streets to the extent of ordering when and where a viaduct or tunnel or other crossing may be placed on such street, then they would certainly have the right, if in their opinion the necessity of the public demanded it, to order the various trunk lines entering this city to change from one street to another.

And likewise, they could order them, without consulting the City authorities, where they might put their freight sheds, passenger depots and their yards and permanent buildings and then command the City to pave and develop or widen, etc., the streets necessary to make useful and available the decrees of said Public Service Commission. Chaos would follow. The City would order the street railway or other utility to abandon a certain street or perhaps, as was

done recently, order the removal of one of the steam railroad trunk lines from one street, where the traffic congestion made its use by freight trains a menace to public life and property to another street less congested and where the business of the railroad could be as successfully handled, and then the Public Service Commission could countermand the order, ignore the City Council, and order the trunk line either to remain in that street or, in the face of the city ordinance, to either elevate its road or make grade crossings. Such elevation in a residential street, if possible of accomplishment, would mean absolute torture and ruin to the residents of that street.

It will doubtless be argued before this Honorable Court that in 1918, the State Legislature gave the Railroad Commission (the predecessors of the Louisiana Public Service Commission) the power and authority, upon request of any police jury, to order any railroad, tramroad, logroad, irrigation or drainage canal crossing any public road, to construct and maintain a suitable and convenient crossing for such public road, and that our Supreme Court upheld that right in the Railroad Commission in the case of *Gulf C. & S. F. Ry. Co. vs. Louisiana Public Service Commission*, 151 La. 635. Of course, we admit that. But for the very reason that it took an act of the legislature to confer this power on appellants, it is conclusive that appellants not only did not have the power before, but that that power was strictly confined to public roads in the country only; which is further shown by the utilities mentioned in addition to railroads, such as logroads, or drainage canals, etc., and had no bearing or relation to a large city like New Orleans, where the control and supervision of the streets have not only been from time immemorial lodged

in this City, but their exclusive rights have been so often upheld by the Supreme Court of this state and by this Honorable Court, that it were a waste of time to cite such decisions now.

It is manifest that in a sparsely settled agricultural state, such as ours, with sixty-three parishes, including the City of New Orleans, each parish having several public roads probably crossing railroads, canals, etc., the power to control the crossings and bridges should be placed in the central power, the Railroad Commission, and not left to the whim of each small county or parish police jury, who through ignorance or prejudice might harass these public utilities beyond endurance, or on the other hand, might so favor some or all of these utilities as to jeopardize the convenience and safety of travellers on the public roads. Had the legislature contemplated taking such rights away from New Orleans and other cities, relative to the supervision and control of their streets, the language must of necessity have indicated that intention. And yet, there is not one word in the act that contemplates lodging the power in the Railroad Commission to order the crossings of a village street, much less the streets or public places of any city. Nor does the language provide that any village, town or city whose government is divorced from that of the parish or county, shall have the right to appeal to the Railroad Commission for such a crossing. Another feature to be considered which has some bearing, is that under our law, particularly our civil code (articles 453, 454 and 458 and other laws, and the jurisprudence thereon), the streets of this city are owned in fee simple and belong to the public and are denominated "common property," which idea of ownership is further demonstrated by

the fact that Act 93 of 1904 authorizes the council of this city to sell a street not over 200 feet long, and Act 83 of 1916 authorizes all municipal councils of cities, towns and villages, to exchange streets for other property for the purpose of laying out new streets, while Act 93 of 1921, amending the city charter, authorizes this City outright to sell streets which are no longer necessary for the public use, etc., etc. While under the same civil code, and the jurisprudence of this state, the title or fee simple to the property used as public roads, is never vested in the public, who only have a right of servitude or the right to use a road as long as it be necessary, free from any obligation to compensate the owner therefor. But whenever the road, for any reason, be abandoned, the use and control of such road at once reverts to the owner who has been compelled to yield it for public use as a highway. Therefore, it should be strange indeed if the control and the use of crossings of streets should be delegated to a public utility board while the legislative body, representing the city that owns that street were ignored and deprived of the control of their own property for their own public, who elected them, among other reasons, for the specific purpose of supervising, paving, draining and controlling the public streets. We submit that this case (151 La. 635), has absolutely no bearing at all in favor of appellant but it must be construed in favor of this city, because it proves that legislative enactment was necessary to place these crossings under the power of appellants, and there has never been any such legislative enactment giving to appellants power and control over either the crossings, streets, or any other public property in the City of New Orleans; but, on the other hand, the specific and exclusive power to con-

trol such streets and public places has for generations been lodged in the City Council of this City. As a matter of fact, in the issue at bar, this City, exercising its delegated control and discretion, had stipulated when the viaduct was built, that it should be strong enough and large enough to permit the street railway to cross it and, of course, even the appellants will not contend that either they themeslves or the railroad in this case has any say or control over the street railways of this City. In order to do equity, the City had ordered and compelled the street railway to pay the larger part of the cost of maintaining this viaduct, and it itself defrayed part of the cost and placed the balance on the M. L. & T. Railroad Company. Recently, when the viaduct needed repairs, this city had before it the question of compelling the street railway company to defray the whole expense of repairing, according to their contract with the City.

This again illustrates the incongruity and chaos that would result did this Honorable Court render the judgment requested of it and denominate two bodies, the Public Service Commission and the City of New Orleans with conflicting powers over the city streets. The Public Service Commission, having no control over the City or the street railroad, undertook to order appellees to defray the whole cost. This was the most they could do, and they did it, and yet the street railroad frankly admitted their legal liability to defray at least a great portion of this cost of repair. Hence, the result of such dual control is that the Public Service Commission might order the railroad to defray all the expense while the City might order the street railroad to pay it all. This is another illustration of the impossibility of having two bosses or of serving two masters.

Suppose the City, which was considering the question of expropriating a sufficient width across the railroad property to continue Newton Street, had decided to continue Newton Street and estabilsh a grade crossing, then if appellant had the right to order the viaduct built over that street no power could have compelled the railroad to remove that viaduct, and the result would be that, a viaduct would be erected across two or three blocks of that street against the wishes and ordinances of the City Council, which would have no right or power to order its removal. If that be true, then appellants herein, in their supervision of railroads, telegraph lines and other utilities coming into this City, have the absolute power to order anything put on the streets that they consider necessary, whether it inconvenience the public or whether the city council wishes it there or not; and if this viaduct or obstruction or special use of the streets and public places should interfere with the franchise and rights that the City has granted to the street railroads and other public utilities, then the City would be in the helpless and ridiculous position of having granted franchises and rights which they would be responsible for in damages, while at the same time having been stripped of the power and jurisdiction to control its own streets and to carry out the contracts that it considered to be for the best interest of the public. We repeat that from any angle that this controversy be viewed, we return to the same conclusion, that such a law as that would result in continual confusion, conflict and chaos, by which the safety of the people and the prosperity of this City would be menaced.

Undoubtedly, the sovereign state that possesses full and ample police power over all utilities within its borders

has seen fit to delegate exclusive police powers over public streets and public places within this City to the City Council, a creature of the sovereign, while the same sovereign has seen fit to delegate other police powers to another of its creatures, the Public Service Commission, i. e., the regulation, supervision and control of the railroads and other statewide utilities.

Section 8 of the City Charter provides that:

> "The Commission Council shall also have power to order the ditching, filling, opening, widening and paving of the public streets and to regulate the grade therefor, and by two-thirds vote to sell or change the destination of any street."

Furthermore, the decision of the Louisiana Supreme Court above referred to relates to the case of a public road which was one of the main traffic lines of the State highway system outside of any urban commmunity and in a rural section of the western portion of the State. In the words of the report of this case (151 La. 637, 92 South. 143):

> "The crossing in question is on the main trunk line of the De Ridder-Lake Charles highway, now under construction. This road is one of the most important under way, and ultimately, on the completion of the various units now being built, will be the main north and south highway of the western part of the state, connecting Lake Charles and Shreveport.
>
> "The plans of the state highway department, under whose jurisdiction and control the road is being built, call for an overhead crossing at the point where this road intersects the line of the defendant. The road is being built with federal aid, and it is shown by the testimony that this aid was

> only available on the condition that an overhead crossing be constructed at this point. The testimony also shows that for some distance this road parallels the line of defendant and crosses the tracks at or near a point where the tracks emerge from a deep cut, the character of this cut being such that trains are not visible, except under favored conditions, from any point on the road until vehicular traffic is either on or so near the crossing as to render the situation hazardous."

Here the danger to be avoided related as much to the safety of the *service* furnished by the railroad company as to the safety of travellers using the highway—a quite different situation from that presented by the instant case, where the viaduct serves and was intended to serve merely as a means of opening a way across the property of the railroad company at a point where no street or way had ever before been opened or even laid out across it.

In view of the facts above recited, and also perhaps in view of the necessity of providing this overhead crossing in order to obtain the proferred federal aid, the Louisiana Supreme Court held that the Louisiana Public Service Commission had the power to compel the railroad company to build the overhead crossing in question. The court was careful, however, to guard against its decision being construed as recognizing that the powers of the Public Service Commission extended to the control and regulation of public highways, even in rural districts, for it said:

> "Nor do we believe that the Act of 1918 and the order adopted by the Commission*****in regard to the public crossing over the tracks of plaintiff, is an attempt to exercise control or regulation of pub-

> lic highways, by the Commission. It is, on the contrary, the exercise of control and regulation over the railroad company, as intended by section 4 of article 6 of the Constitution, in its relations with the general public represented by the police jury of Beauregard parish and the State Highway Commission."

Be this, however, as it may, the Louisiana constitution itself, as we have before shown, has declared that none of its provisions shall affect or take away from the city of New Orleans and other municipalities in Louisiana whatever powers they had over local public utilities; and there can be little doubt that the viaduct here in question (which the city caused to be constructed for the sole purpose of extending a public street across private property, without actually converting the ground at said crossing into a roadway), is a *local public utility, municipally owned.* As before said, the viaduct itself is a street or highway carried, by agreement with the railroad company, over land owned by the compnay and with respect to which the city and public have as yet acquired no right to use it as a grade crossing.

It is quite clear that it was not intended by the framers of the constitution to confer jurisdiction and authority upon the Public Service Commission to regulate and enforce the performance of the duties of such companies in all their various relations with the public, but that its jurisdiction was intended to be limited to matters pertaining to the performance of their public duties relating to the transportation of persons and property and all dealings and intercourse that have any bearing upon or in any way relate to such transportation.

It will be noted that while the first paragraph of section 4 gives the Commission unqualified authority to supervise, govern, regulate and control all common carrier railroads, nevertheless the second paragraph of said section defines this general grant of power by providing that it shall affect and include all matters and things connected with, concerning, and growing out of *the service* to be given or rendered by common carriers and other public utilities. It is clear from this language that the powers of the Commission extend only to matters and things concerning the *service* to be given by the railroad company, that is to say, to the transportation of persons or property. If the viaduct here in question were in any way connected with the transportation of persons or property by the railroad company—if, for instance, it were a viaduct over which the tracks of the railroad company were operated—it would be a thing connected with the service given by the railroad, and the Public Service Commission might have jurisdiction.

Or, if the viaduct were used as an approach to an office warehouse, track or other facility of the railroad company, it would likewise be related to the service rendered by the company, and the Public Service Commission might have jurisdiction.

But, on the other hand, it is clear that the constitutional grant of power to the railroad commission does not vest in that body the power to regulate and enforce the performance of the duties of railroad companies in *all* of ther various relations with the public, and that its jurisdiction does not extend to matters pertaining to the performance of public duties having no relation to the service to be rendered by the railroads.

The complaint filed with the commission by the citizens of Algiers, considered in connection with the evidence introduced at the hearing, makes it clear that the primary purpose of the order was to require the repair of the viaduct at Newton Street for the benefit of the public who travel over said viaduct and not for the benefit of the public who travel on said railroad under that viaduct. It did not in any way pertain to the transportation of persons and property by the railroad company; neither was it necessary for the use of the public in transacting business with the railroad company.

That the commission has no jurisdiction, except such as expressly or by necessary implication is conferred upon it by the constitution, must be admitted, and care should be taken not to enlarge or diminish the jurisdiction which is conferred. (*State vs. Jackson Terminal Co.*, 71 So. 474; *Atlantic Coast Line R. Co vs. State*, 74 So. 595; *City of Red Bluff vs. Sou. Pac. Co.*, 187 P. 152). However, under a strict construction, the conclusion is inevitable that the powers conferred upon the Public Service Commission with respect to railroads relates solely to the transportation of persons and other property, or to such intercourse and dealings of the public with the railroad companies as are in some way connected with transportation.

We doubt if it would be the part of wisdom to extend the jurisdiction of the Public Service Commission over matters wholly disconnected from the business of transportation. If the jurisdiction of the commission were expressly extended by legislative declaration to matters such as the one concerned in this case, it might not be an unwise thing to do; but if such power or jurisdiction to deal with this particular subject matter be implied by

interpretation construction, then it must naturally be conceded to exist in all matters pertaining to the performance by railroad companies of their public duties, regardless as to how far removed from the business of transportation the performance of such public duty may be. In other words, every requirement made of such company by law and in every instance where the exercise of power may be forbidden by law, it would devolve upon the Commission to require obedience to such demands of the law, whether it be acts of commission or omission. Under the law, it is a public duty of railroad companies to pay their taxes; and it would be just as reasonable to construe the grant of power in the section of the constitution above quoted as extending to the enforcement of this public duty.

It is admitted that a viaduct at Newton Street is needed for the use, safety and convenience of the public; and the city joins with the Public Service Commission in its contention that it is a public duty of the railroad company to construct, maintain and repair this viaduct for the convenience and safety of the people of the city. Moreover, the power to compel the railroad company to construct, maintain or repair the viaduct comes squarely within the police power of the state. If this power has not been specifically granted to some officer or board authorizing the requirement of this public duty, when desired and found necessary by and for the people in any community, the people certainly have the power, and acting through the Legislature may exercise it at will, subject only to federal or state constitutional restrictions. (*State ex rel. Minneapolis vs. St. Paul, M. & M. R. Co.*, 98 Minn. 380, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047, id. 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698, and authorities cited.)

The only question is, Where has the power been lodged, if at all, and where should it be exercised? It seems that this power should be exercised in such a manner that there will be as little confusion as possible, and without any conflict of jurisdiction. The enforcement of the performance of all public duties by railroad companies pertaining to the business of transportation can be seen at a glance, by reason of not being confined to any particular locality, but general in its nature, and should be lodged exclusively in the Public Service Commission. But, on the other hand, the performance of all such public duties, such as construction and maintenance of a viaduct in order to extend an unopened street across the land or right of way at a railroad, where it relates in no way to the transportation of persons or property, and is not necessary to be used by the public in dealing with the railway, should be left in the hands of local authorities. The people in each community know their needs best; they know better when such improvements should be made, and the character necessary to reasonably and conveniently meet their wants; they are in a position to expeditiously enforce the performance of this public duty.

The reasoning and philosophy which we urge upon the court has heretofore been applied in several recorded cases.

In the case of *A. T. & S. F. Railway Company vs. Corporation Commission of State of Oklahoma*, 170 Pac., 1156, the Oklahoma constitution gave the Corporation Commission of Oklahoma the power "of supervising, regulating and controlling all transportation and transmission companies doing business in this state, in all matters relating to the performance of their public duties and their

charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies"; and to that end was also given power from time to time to "prescribe and enforce against such companies, in the manner hereinafter authorized, rates, charges, classifications of traffic and rules and regulations", and to require them "to establish and maintain all such public service, facilities and conveniences as may be reasonable and just."

In this case the Attorney General filed a complaint before the Corporation Commission charging that the railway company operated a line along and across certain streets in the city of Guthrie and refused to maintain a safe and suitable crossing where its tracks crossed said streets, thereby endangering the safety of the traveling public in using said streets. The Oklahoma Supreme Court said that the Corporation Commission had no jurisdiction except such as expressly or by necessary implication was conferred upon it by the constitution; and that it was quite clear that the framers of the constitution did not intend to confer jurisdiction upon the Corporation Commission to regulate and enforce all the public duties of railroad companies, but that its authority was intended to be limited to matters pertaining to the performance and public duties relating to the transportation of persons and property and all dealings and intercourse that have any bearing upon or in any way relate to such transportation.

A case very similar to the one at bar is *People ex rel. New York, etc. R. R. Company vs. Willcox*, 94 N. E. 212, 200 N. Y. 423. Complaint was made to the Public Service Commission of New York that the N. Y. N. H. & H. Railroad Company maintained and loaded its manure cars in its Harlem River Yards in an unsanitary and offensive

manner in violation of the sanitary code of the Department of Health. The court notices that the complaint related not to the inconvenience or discomfort of the company's passengers, nor to any other portion of its road than that within the city of New York. The railroad company moved to dismiss the complaint on the ground that the matter was one for the Board of Health and not within the jurisdiction of the Public Service Commission.

Under the New York law, the Public Service Commission had general supervision of all common carriers, with power to examine the same and keep informed as to their general condition and the manner in which their lines were managed, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with all the provisions of law, orders of the commission and charter requirements. The New York Court of Appeals said:

> "Broad as are the powers conferred by the act, they are, by plain intendment, as I read them, such as are directed, exclusively, to the amplest supervision and regulation of railroad corporations, equipment, terminal facilities and operations in the transportation of persons and property. The exercise of the powers is intended to be when rendered necessary, in the judgment of the commissions, by reason of the unjust, unsafe, or inadequate, regulations, practices, equipment, appliances, or service, 'in respect to the transportation of persons, freight, or property.' The object of the legislature, as fairly to be deduced from its enactment, was to regulate the management and the operations of common carriers, within the state, in the interest of the public, that is, of the persons who should use the facilities for the transportation of themselves, or of their

property, who should serve them; or who should be interested in them, as holders of their capital stock, or obligations. The commissions were given extensive powers; but they should not be extended by implication beyond what may be necessary for their just and reasonable execution. They are not without limits, when directed against the management, or the operations, of railroads, and the commissions cannot enforce a provision of law, unless the authority to do so can be found in the statute. (See *Village of Fort Edward vs. Hudson Valley Ry. Co.*, 192 N. Y. 139; *People ex rel. South Shore Traction Co. vs. Willcox*, 196 ib. 212; *People ex rel. D. & H. Co. vs. Stevens*, 197 ib. 1.) Nor should they reach out for dominion over matters not clearly within the statute.******

"When we consider the order, now, in question, we find it has no pertinence, except as it is directed to the abatement of a nuisance, complained of as affecting the health and comfort of the locality, where is situated the terminal freight yard of the relator. As that locality is within the territorial jurisdiction of the municipal department of health of the city of New York, the question is, whether the court shall say that that jurisdiction has been shorn of the power to act as against a railroad corporation. If it cannot be said that the Public Service Commissions Law was intended to furnish the only law upon the subject, it cannot be deemed to deprive the local board of health of the jurisdiction to act in matters concerning the health of the community.******With statutory provisions existing, general and special, it should not be presumed that the legislature intended to interfere with these administrative departments of municipalities, in the absence of unmistakable language. I believe it to be a fundamental concept of our form of government, that in the local subdivisions of the state, the

people of the locality shall administer their own local affairs, to the extent not restricted by some consitutional provision. I concede the right of the legislative body to regulate the acts of local officers. I concede the interest in the public health of the whole state to be such as to justify an exercise of the legislative power to regulate administrative functions in that respect, which have been committed to local jurisdictions; but it does not follow that officers acting under the appointment of the state executive and the senate should, also, be authorized to perform the local functions of a board of health. There is no pretense, either, of a state policy, or of the existence of local abuses, which would justify interference by the state with this administrative department of the city government, and what other reasonable, or politic, ground is there for implying an intent to interfere? The legislative, in creating the public service commissions, had in contemplation a general system for the supervision and the regulation of common carriers within the state; which should promote efficiency in management, operations conducive to the comfort and safety of passengers and employees, and an equipment and facilities adequate and proper for the transportation of persons and property. Boards of Health existed to act locally and exclusively for the protection of the health of municipalities. No intent to interfere with matters committed to their jurisdiction is clear from the language of the act and none should be implied. Powers, differing as the objects proposed to be attained differed, were vested in the two bodies. In their several spheres of action, each body had its peculiar and special functions, with machinery supposed to be adequate to reach the evils aimed at and to enforce its mandates for their cure. To hold that they could act concurrently, not

only would be without justification in the scheme of this statute; it would permit of a clash of authority and an acute situation might arise, as Mr. Justice Scott observed in dissenting below.

"Those views lead me to the conclusion that the public service commission was without jurisdiction to entertain the complaint and to make the order in question."

The New York case above quoted at length was followed in *City of Syracuse vs. N. Y. Street Railways*, 189 N. Y. S. 763.

Finally, we note *Atlantic Coast Line Railroad Company vs. State*, 74 South 595, where the court held that railroad commissions can exercise only such authority as has been legally conferred by express provisions of law or such as by fair intendment is incident thereto and any reasonable doubt of any particular power is to be resolved against their exercise of it.

We, therefore, submit that the jurisdiction of the Louisiana Public Service Commission has no relation to a viaduct constructed by municipal corporations for the purpose of extending a street across the private property of a railroad, for the convenience of the general public, and that said Commission has no power to order the railroad company whose land is crossed by such a viaduct to maintain the viaduct and keep it in repair.

Respectfully submitted,

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Feb. 14, 1924.